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Joint written statement* submitted by Institute for Policy Studies (IPS), a non-governmental organization with special consultative status, a non-governmental organization with general status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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8 PROPOSALS FOR THE NEW LEGALLY BINDING INTERNATIONAL INSTRUMENT ON TRANSNATIONAL CORPORATIONS (TNCs) AND HUMAN RIGHTS

In June 2014, the Human Rights Council adopted resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights. This is a historic achievement after decades of discussions and failed attempts within the United Nations. Such an instrument has the potential to substantially promote the protection and fulfilment of human rights in the long-term and on a global scale. It can contribute to ending the impunity that TNCs routinely enjoy for their human rights violations, especially in countries of the Global South, and to ensuring access to justice for the victims of their activities.

This submission contains eight proposals related to the nature, the scope, the form and the content of the future legally binding international instrument. It is submitted on behalf of the Global Campaign to Dismantle Corporate Power and Stop Impunity, an international network comprising over 200 social movements, networks, organizations, and representatives of victims and affected communities from all around the world. The Global Campaign was actively involved and facilitated the gathering of dozens of delegates in Geneva for a week of high profile mobilization during the Human Rights Council session in June 2014 to demand new binding norms on human rights and TNCs

Officially launched in Rio in 2012, the Global Campaign has been working on, among other things, a proposal for an International Peoples Treaty on the Control of TNCs. This proposal was built from the grass roots in 2013-2014 – from the recommendations of victims, affected communities and social movements and other civil society organizations in Africa, Asia, Latin America, Europe, the USA and Canada. The Peoples Treaty has two main pillars: proposals addressing legal challenges to corporate accountability and proposals on alternatives addressing the need for transformative systemic change of the current corporate economic model. This submission was developed on the basis of these proposals.

1. The legally binding international instrument must focus on TNCs

TNCs are individual economic/financial entities, or groups of such entities, that conduct economic/financial activities in more than one country. They are generally made up of a parent company that operates in countries other than that of the parent country through foreign direct investment or other economic-financial practices, without creating a local company, or through subsidiaries registered as local companies. Today they are over 40'000 in the world and in 85% of these cases the parent company has its headquarters in a country of the Global North.

With the globalization of the economy, TNCs have become major and powerful actors, and their activities, directly or indirectly, have a huge negative impact on human rights, e.g. through labour practices or environmental impacts among others.

TNCs benefit from various binding agreements, such as free trade agreements (FTAs) and bilateral investment treaties, and agreements made at the World Trade Organization (WTO), with enforcement mechanisms such as investor-to-state arbitration tribunals or dispute settlement mechanisms, protecting their interests. However no mechanisms exist in parallel at the international level to deal with their human rights violations and to ensure access to justice for the victims of their activities. In the absence of binding agreements at the international level, impunity typically prevails, especially when victims are in the Global South.

TNCs are able to escape any control because of the unprecedented economic, financial and political power they command, their transnational character, their economic and legal flexibility and the complex structures they use to evade national and international laws and regulations.

Many TNCs are richer and more powerful than the states that seek to regulate them. It is estimated that 80% of trade takes place in value chains linked to TNCs. The top 25 TNCs alone had an annual revenue of approximately US$ 5.6 trillion in 2014. And of the world's 100 largest economic entities (including nation states), 37 are TNCs. The economic, financial and political power of TNCs is such that most states are not able to regulate their activities much less hold

them responsible for any harm they have done. And many states do not wish to hold TNCs accountable, being more interested in attracting foreign investment. It has been repeatedly pointed out that a major obstacle to the full realization of all human rights, in particular economic, social and cultural rights, is this concentration of economic and political power in the hands of the leading TNCs.

Moreover TNCs use a transnational structure and complex schemes to avoid liability and national jurisdictions, and evade their legal responsibilities. Their headquarters, where decisions take place and financial resources are managed, are ordinarily based in countries with the weakest tax, accountability and transparency laws, typically far from where they carry on their major economic activities and where their business activities may adversely affect human rights. And TNCs generally operate through affiliates, sub-contractors, licensees or local business enterprises, supposedly independent but de facto under their control. It thus becomes extremely difficult to hold TNCs liable for the human rights violations arising from their activities.

Hence there is a major legal gap in international human rights law that needs to be closed to end the impunity for human rights violations committed by TNCs. This must be the main objective of this new legally binding international instrument.

2. The legally binding international instrument must affirm the obligation of TNCs to respect all human rights

The new legally binding international instrument must affirm the obligation of TNCs to respect all human rights (civil, political, economic, social and cultural rights as well as the right to development). Specific obligations must be defined in detail, in particular regarding the right to life, the right to freedom of association, the right to freedom of opinion and expression, the right to non-discrimination, the right to work, the right to food, the right to water, the right to housing, the right to health, the right to self-determination and the right to a healthy environment. The legally binding international instrument must also include provisions on the obligations of TNCs regarding certain vulnerable and particularly affected groups, such as youth, children, women, migrants, indigenous peoples and human rights defenders.

This obligation of TNCs to respect human rights must also include the obligation to ensure that their subsidiaries, chain of suppliers, licensees and subcontractors also respect human rights. And TNCs must be held accountable for the human rights violations they commit outright as well as those they commit by complicity, collaboration, instigation, omission, negligence or dissimulation.

The new legally binding international instrument must therefore include the obligation of TNCs to respect international human rights law, international labour law and international environmental norms. TNCs must also have the obligation to respect national laws and regulations, and abstain from interfering in their development. TNCs must be bound to recognize the principle of the primacy of human rights and public interest over private economic interests.

The treaty must also include a provision on the duty of TNCs to fulfil their tax obligations so that states may guarantee human rights, especially economic, social and cultural rights and the right to development.

The instrument must explicitly prohibit acts constituting war crimes, crimes against humanity, genocide, torture, forced disappearances, displacements, executions and violations of international humanitarian law. It must also prohibit TNCs from hiring private militias and using private security services outside of company property.

The legally binding instrument must establish the obligation of TNCs to respect all international and national provisions and laws that prohibit discrimination on the basis of race, colour, gender, religion, political opinion, nationality, social origin, social status, belonging to an indigenous or Afro-descendant people, disability, and age, among others.

TNCs must be under obligation to respect the rights of women and their living conditions, and they must not exploit them or contribute to the perpetuation of violence against them. TNCs must stop perpetuating wage gaps and the gendered division of labour and must also be bound to respect the rights of migrant workers and those of indigenous peoples as recognized at the international level.

The United Nations treaty must include the obligation of TNCs to refrain from all forms of collaboration (economic, financial or supply of services) with other entities, institutions or people that commit human rights violations. TNCs

must also be obligated to engage in fair trade and marketing practices and to adopt all reasonable provisions to guarantee the safety and quality of the products and services they offer, including respect for the precautionary principle. Further, they must be prohibited from producing, selling or marketing products that are dangerous or potentially dangerous to people, animals or nature, such as toxic products, transgenic seeds or highly hazardous pesticides.

The instrument must also establish the obligation of TNCs to conduct their activities in accordance with national laws and regulations, administrative practices and policies on environmental protection, while complying with international agreements, principles, norms, commitments and objectives relative to the environment and human rights, public health and safety, as well as bioethics and the precautionary principle. The instrument must include provisions to end environmental dumping. TNCs must be held responsible for the environmental impacts of their activities, such as water, soil and air pollution, or the destruction of ecosystems. They must be bound to provide compensation for the peoples, communities and states affected and, where appropriate, repair the damage and restore the environment.

TNCs must be under obligation to contribute to the local economy and generate decent and secure jobs. The new legally binding international instrument must include the obligation of TNCs to abjure all recourse to forced or child labour, as well as the obligation to provide a safe and healthy work environment, to pay a wage that guarantees a decent life to workers, and to respect trade union freedom, the right to strike and collective bargaining. The instrument must include provisions to end social and wage dumping.

The legally binding international instrument must impose on TNCs the obligation to pay reasonable prices to their suppliers and subcontractors, thus enabling the payment of decent wages and provision of decent jobs. The royalties TNCs receive from licensees must be set at reasonable levels for the same reason. TNCs must be bound to subordinate to international human rights law their activities in the area of intellectual property, science and technology.

The legally binding international instrument must establish the obligation of TNCs to publicly identify the countries where they carry out any kind of commercial and/or financial activity, and to publicly identify their subsidiaries, suppliers, subcontractors and licensees, as well as the legal framework of their participation in other companies or legally registered entities.

The treaty must add a provision stating that TNCs must rapidly, effectively and adequately compensate individuals, entities and communities harmed by their practices, providing compensation, restitution, retribution and rehabilitation for all damage caused or all goods depleted.

3. The new legally binding international instrument must affirm the obligation of states to protect against human rights violations committed by TNCs and must codify their extra-territorial obligations in this regard

The future United Nations binding treaty must affirm the obligation of states to protect against human rights violations committed by TNCs and list in detail the specific measures that states need to implement. These would in particular involve regulating TNCs in order to prevent human rights violations from occurring as well as establishing effective mechanisms at the national level to enable access to justice and remedy for victims and affected communities.

The treaty must also contain the specific and detailed obligations of states regarding their duty to protect. It must in particular include the obligation to consult local communities before granting any concession to TNCs, to prohibit the use of its armed forces by TNCs, to criminalize public and private corruption, to regulate financial markets and prohibit speculation on food commodities, to prohibit patents on life forms and the privatization of certain goods and services that are indispensable to human rights and public interest, and to prevent private monopolies and abusive business concentrations, including in the media. States must assume the responsibility to protect human rights defenders and whistle-blowers working in the framework of TNC accountability and in any case must not be allowed to criminalize such efforts. States must as well be required to eschew cooperation with TNCs implicated in human rights violations.

A decisive contribution of the United Nations binding treaty must be to recognize that states have extra-territorial obligations related to their duty to protect human rights against TNC abuses, and it must clarify their content and the situation wherein they may arise. Thus, the treaty must require states to regulate the extra-territorial activities of TNCs and ensure access to justice and redress for the affected communities and victims of the activities of TNCs abroad.

States must in particular ensure that TNCs based on their territory respect all human rights, including international human rights law, international labour law and international environmental norms, when operating abroad. They must sue and sanction these TNCs when they violate human rights. The treaty must clarify when such extra-territorial obligations arise but a state must, at a minimum, be bound by extra-territorial obligations when a TNC has its centre of activity, is registered or has its headquarters, or has substantial business or financial activities, in the state concerned. The United Nations binding treaty must also include the obligation of states to cooperate at the international level, including in all judicial fora, to protect human rights from the operations of TNCs that affect these rights.

4. The legally binding international instrument must reaffirm the hierarchical superiority of human rights norms over trade and investment treaties and develop specific state obligations in this regard

A proliferation of free-trade and investment treaties has conferred tremendous economic, legal and political power upon TNCs and states have been pushed to take measures that erode their own sovereignty, the role of the public sector and the protection of human rights. These treaties favour the privileges and profits of investors and TNCs over peoples' rights and international human rights law. They protect TNCs from any decision that could negatively affect their investments, and even future profits, and do not take into account states' binding human rights obligations.

International investor-to-state arbitration tribunals are a special concern as they allow TNCs to sue states to impose their will and promote their interests There have been several instances where states, having taken or attempting to take human rights or public interest measures, were challenged or forced to pay tens of millions of dollars to TNCs in compensation.

For example, in 2012, action was brought against Egypt at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) for having raised the minimum wage from € 41 to € 72 per month to enable people to better fulfil their right to food, health care and education. In 2010, Philip Morris launched law suites against both Uruguay and Australia for introducing laws that would dissuade people from smoking and damaging their health. In 2004, Mexico was ordered to pay more than US$ 90 million to Cargill for introducing a tax on sodas intended to improve people's health. In 2010, Guatemala was ordered to pay US$ 25 million to Tampa Electric for introducing a law capping electricity prices to allow the poor better access to basic services. And the Swedish public group Vattenfall has filed a complaint against Germany for the decision to end nuclear energy by 2020, to avoid any nuclear accident that could kill millions, estimating its profit shortfall to be € 4.7 billion.

Three quarters of the complaints filled at the ICSID come from TNCs based in the United States and the European Union, and they target countries of the Global South. In two thirds of the cases, TNCs have been successful and have received large settlements, or states have been forced to reduce their standards as part of a compromise. This is a serious issue the future treaty needs to address. And the problem is not limited to investor-to-state arbitration tribunals but also extends to other international mechanisms, such as the WTO dispute settlement.

In conformity with the United Nations Charter, the future legally binding international instrument must reaffirm that international human rights laws are hierarchically superior to international trade and investment norms. The treaty must ensure that states develop, implement and comply with international human rights and environmental treaties, agreements and rules, and subordinate to them the international rules related to trade, investment, finance, taxation and security. In particular, the legal principles linked to free trade and investment norms (national treatment, most favourable nation etc.) must be subject to international human rights norms.

The treaty must obligate states to introduce a binding human rights supremacy clause into all trade and investment treaties that they sign, and to renegotiate existing agreements to this effect, or else to cancel them and refuse to sign any such agreements that do not explicitly recognize the supremacy of human rights obligations. States must be under the obligation to introduce into these treaties clauses concerning the universality, indivisibility and interdependence of human rights, as well as the defence of essential public goods such as water, health, education, and public services as well as the protection of public enterprises and cooperatives. The binding instrument must also establish obligations in relation to the consultation of peoples, social movements, affected communities and consumers, as well as provisions for a democratic and transparent development process.

The treaty must prohibit states from submitting an investor-state dispute to an international arbitration body under any circumstances, as this undermines states' sovereignty, impairs their ability and duty to protect human rights and vitiates individual and peoples' rights recognized under international human rights law.

5. The legally binding international treaty must establish the civil and criminal responsibility of TNCs and their executives, as well as the shared liability of TNCs for the activities of their subsidiaries, suppliers, licensees and subcontractors

The United Nations treaty must require states to provide within their national jurisdiction for the legal liability (civil and criminal) of both TNCs and their executives (e.g. CEOs, managers, boards of directors). The principle of double indictment – liability of both the legal entity and the individuals who take the decisions – must be recognized.

This civil and criminal responsibility must apply to crimes and offences committed outright by TNCs and the executives themselves as well as to those resulting from complicity, collaboration, instigation, omission, negligence or dissimulation.

The treaty must include strong provisions on the shared liability of transnational corporations with their subsidiaries (de jure or de facto) and their chain of suppliers, licensees and subcontractors.

This shared responsibility of TNCs with their subsidiaries, suppliers, subcontractors and licensees is a key issue, as it is common practice for TNCs to externalize costs, risks and thus the liabilities – which end up being assumed almost entirely by their subsidiaries, suppliers, subcontractors and licensees – while continuing to earn exorbitant profits and act with impunity.

The case of the textile industry in Bangladesh is a clear example. There, a substantial textile industry is mostly under subcontract to major TNCs that take advantage of the country's weak labour legislation. In April 2013, the collapse of the Rana Plaza building, where several garment factories operated, resulted in more than a thousand deaths and some 2,500 injured workers. The Rana Plaza incident was considered as one of the deadliest industrial accidents in South Asia in the last 30 years since the Bhopal incident in India. Yet TNCs denied any responsibility and legal liability and blamed their local subcontractors and suppliers, as well as local governments. Some of the major brands, such as Gap Inc. and Benetton, refused even a modest contribution to compensate the victim's families.

The principle of shared liability must also be applied upward, so that investors, shareholders, banks and pension funds that finance TNCs can be held liable for the human rights violations that TNCs commit.

6. The future legally binding international instrument must include provisions on the obligations of international and regional financial and economic institutions

The economic policies imposed by the International Monetary Fund (IMF), the World Bank and other regional banks contribute to the impunity of TNCs and are responsible for numerous human rights violations. The structural adjustment policies and conditions demanded by the international financial institutions operate as a straight jacket which obliges states to open up their countries to TNCs.

Structural adjustment usually involves, among other things, the devaluation of the national currency, a rise in interest rates, a reduction of public expenditure, wide-scale privatizations, reduction of public subsidies, the reduction or complete removal of various regulations and standards, such as labour and environmental standards, the orientation of the economy towards export markets.. All of which ultimately benefit TNCs and create an architecture of impunity. These policies were imposed on countries of the Global South by the IMF and the World Bank in the last decades and are now also imposed on countries of the Global North such as Greece. The World Bank and other regional banks are also financing many project that involve massive human rights violations committed by TNCs.

A famous case in 1999-2000 involved Bolivia – at the demand of the World Bank – turning over the management of the city of Cochabamba's water supply and treatment system to a single bidder representing several TNCs. Within the framework of this arrangement, which was to last for 40 years, the water rates immediately rose, going from an admittedly negligible level to something in the neighbourhood of 20% of monthly household income, and peasants have

been including prohibited to collect water from the rain. The armed forces intervened to stop citizen demonstrations, causing six deaths, but the demonstrations continued until the consortium was forced to leave the country.

Another case involves the World Bank, through the International Finance Corporation and the International Bank for Reconstruction and Development, funding the building of highways and electricity infrastructure in Guatemala to facilitate the operation of the Marlin mine by Montana Exploradora, a subsidiary of a TNC based in Canada (Goldcorp). This was done without the prior and informed consent of the affected indigenous peoples, contrary to what United Nations instruments and ILO Convention 169 require. In addition, the World Bank and IMF pressured the Government of Guatemala to develop a new legal framework favorable to TNCs to attract foreign direct investments, specially in the mining sector. All of this was done despite foreseeable major negative impacts on health, the local economy and access to water and was accompanied by the social and political repression of those opposing the mining industry.

International and regional financial and economic institutions, in particular the IMF and the World Bank, bear therefore a major responsibility for the human rights violations committed by TNCs and the impunity they enjoy too often. Yet, the IMF and the World Bank are specialized United Nations agencies, and as such their decisions must conform to the United Nations Charter and respect human rights.

It is therefore crucial that the legally binding instrument include provisions on the obligations of these international and regional financial and economic institutions. It must require at a minimum that these institutions contribute to the implementation of the treaty and refrain from taking measures contrary to its objectives and provisions.

7. Mechanisms must be established at the international level to enforce the treaty and monitor its implementation

Besides the lack of binding international norms, a central consideration in putting an end to the impunity of TNCs committing human rights violations is the lack of enforcement and monitoring mechanisms at the international level. This is a major gap the treaty must deal with. It should in particular create three bodies: a body overseeing compliance, a Public Centre for the Control of TNCs and a World Court on TNCs and Human Rights. These bodies will be provided with the means necessary for their proper functioning. TNCs and states will have the obligation to cooperate with these bodies and provide them with all the necessary information and data.

A treaty body (committee) must be established to monitor whether states and TNCs respect their obligations and implement the treaty. It must be able to receive individual and collective complaints regarding specific cases of breach of the treaty. A decisive contribution of this United Nations binding treaty must be to open up the possibility for victims to submit complaints against TNCs for their failure to comply with their obligations to respect human rights.

To complement this treaty body, a Public Centre for the Control of TNCs must be established. It will have the mandate to analyse, investigate, document and inspect the practices of TNCs and their effects on human rights. Government officials, social movements, trade unions, affected communities and indigenous peoples must participate in the management and supervision of the Centre.

The United Nations binding treaty must provide for the establishment of a World Court on TNCs and Human Rights. It must be complementary to national, regional and international human rights mechanisms and be based on the principle that affected individuals, communities and states must have access to an independent international legal body in order to obtain redress for violations of civil, political, economic, social, cultural and environmental rights committed by TNCs. The Court would be responsible for receiving, investigating and judging complaints against TNCs. New types of international crimes, such as economic crimes, financial crimes, corporate crimes and environmental crimes, must be recognized and fall under the purview of the World Court. The Court will consider both the civil and criminal responsibility of TNCs and their executives, as well as the shared liability of TNCs for the activities of their subsidiaries, suppliers, licensees and subcontractors.

8. Negotiations must be protected from corporate capture

For several years now the United Nations has opened its doors to transnational corporations, presented under the name of "stakeholders". In so doing, the United Nations is following a general global trend that consists of involving giant

economic and financial conglomerates in decision making to the detriment of states, governments and civil society in general. Allowing such "stakeholders" into the United Nations became official on 25 July 2000 at the New York headquarters when the Secretary-General launched the Global Compact in which 44 major TNCs and other "representatives of civil society" participated. The Compact's declared objective is to secure the voluntary respect by TNCs of ten principles of human rights law, labour law, environmental law and to oppose corruption.

This alliance between the United Nations and major TNCs has created a dangerous confusion between, on the one hand, a public international political institution which, according to its charter, represents "the peoples of the United Nations" and, on the other hand, a group of entities that embody the private interests of an international economic elite. Such an alliance is completely contrary to the process necessary for the democratization of the United Nations and the ending of corporate capture.

It can be asserted today that this voluntary approach has failed. It has mainly enabled TNCs to benefit from their association with the United Nations without having to prove their conformity with United Nations core values and principles, nor United Nations human rights treaties. And indeed they have not changed their practices at all. Now, the influence of TNCs on the decision-making of the United Nations bodies has contaminated the entire system.

It is therefore essential to take all necessary measures against the influence of TNCs during the whole process of preparing and negotiating a new binding international instrument in order to prevent and sanction human rights violations they commit. Experience has shown the ability of TNCs to mobilize enormous resources to thwart any attempts to regulate them seriously at the international level. TNCs are not stakeholders or the subjects of human rights, nor democratic and transparent entities. By definition, TNCs are entities that defend private interests (above all those of a handful of majority shareholders) as opposed to the general interest. They must not be allowed to participate directly in the process where they would be both the accused and the judges. Negotiations would take place on an unequal footing, given that civil society organizations, and even many countries of the Global South, have limited financial resources and would be directly confronted with TNCs with an annual turnover of tens – even hundreds – of billions of US$.

Accion Ecologica (Ecuador), AITEC (France), All India Forum of Forest Movements - AIFFM (India), Alliance Against Mining - ATM (Philippines), Asamblea por la Suspensión del Pago e Investigación de la Deuda y por la Defensa del Patrimonio Nacional y los Bienes Comunes (Argentina), Asamblea Veracruzana de Iniciativas y Defensa Ambiental - LAVIDA (Mexico), Asian Peoples Movement on Debt and Development - APMDD, ATTAC Argentina, ATTAC France, ATTAC Switzerland, Committee for the Abolition of Third World Debt - CADTM, CADTM - AYNA (Latin America), CADTM Switzerland, Center for Research and Documentation Chile-Latin America - FCDL (Germany), Central de Trabajadores de Argentina - CTA (Argentina), Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J." - CSMM (Ecuador), Centro de Estudios para la Justicia Social - Tierra Digna (Colombia), Colectivo RETS (Spain), Colectivo VientoSur (Chile), Committee for human rights in Latin America (Canada), Common Frontiers (Canada), Coordination Climat et Justice Sociale, Switzerland, Diálogo 2000 - Jubileo Sur (Argentina), Ecologistas en Acción (Spain), Ecosistemas (Chile), Ecuador Decide (Ecuador), Entrepueblos (Spain), European Water Movement, Equit Institute (Brasil), FASE (Brasil), Focus on the Global South, France Latin America (FAL), Fresh Eyes - People to People Travel (United Kingdom), Friend of the Earth International, Friend of the Earth Latin America and Caribean, Friends of the Earth - NAT (Brasil), Friends of the Earth Colombia – CENSAT, Friends of the Earth Costa Rica - COECOCEIBA, Friends of the Earth El Salvador – CESTA, Friends of the Earth France, Friends of the Earth Guatemala - CEIBA, Friends of the Earth Mozambique - JA!, Friends of the Earth Spain, Friends of the Earth Uruguay - REDES, Fundación de Estudios para la Aplicación del Derecho - FESPAD (El Salvador), Fundación Servicio Paz y Justicia (Argentina), Fundación Solón (Bolivia), Groupe écosocialiste de solidaritéS (Switzerland), Indonesia for Global Justice - IGJ (Indonesia), Initiatives for Dialogue and Empowerment through Alternative Legal Service - IDEALS (Philippines), Inter-American Platform for Human Rights, Democracy and Development - PIDHDD, Instituto Políticas Alternativas para o Cone Sul - PACS (Brasil), Jubileo Sur America, Justiça Global (Brasil), La Via Campesina International, Laboratorio de Investigación en Desarrollo Comunitario y Sustentabilidad - LIDECS

(Mexico), Multiwatch (Switzerland), Observatorio de Conflictos Mineros de América Latina - OCMAL, Observatorio de la Deuda en la Globalización – ODG (Spain), Observatorio de Multinacionales en América latina - OMAL (Spain), Oekumenisches Buero fuer Frieden und Gerechtigkeit e.V. (Germany), Polaris Institute (Canada), Rede Mexicana de Accion contra el Libre Comercio - RMALC (Mexico), SENTRO Trade Union (Philippines), SOLdePaz.Pachakuti (Spain), SolidaritéS (Switzerland), SOLIFONDS (Switzerland), Stop the Wall Campaign, ToxicsWatch Alliance - TWA (India), Trade Union Confederation of the Americas - TUCA, Transnational Institute - TNI, Transnational Migrant Platform - TMP, Unidad Ecológica Salvadoreña - UES (El Salvador), Union of People Affected by Texaco-Chevron in Ecuador - UDAPT (Ecuador), War on Want (United Kingdom), Women in Development in Europe+ - WIDE+, World March of Women (Switzerland) and World Rainforest Movement - WRM., NGOs without consultative status, also share the views expressed in this statement.

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Written statement* submitted by Friends of the Earth International, a non-governmental organization in consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

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Please recycle

Proposals for a Treaty on Transnational Corporations (TNCs) and other business enterprises in relation to Human Rights

Friends of the Earth International (FoEI), the largest grassroots environmental federation, uniting 75 national member groups and some 5,000 local activist groups on every continent, with over 2 million members and supporters around the world, has welcomed the United Nations Human Rights Council (UNHRC) resolution 26/09 that calls for a legally binding Treaty for Transnational Corporations (TMCs) and other business enterprises with respect to human rights. FoEI is a member of the Treaty Alliance and founder member of the Global Campaign to Dismantle Corporate Power and End Impunity.

The establishment of an international legally binding instrument to control TNCs is a long standing demand of FoEI and many other social movements and civil society networks. This initiative is an unprecedented opportunity to enshrine human rights above vested economic interest, be they: on protection of human rights and environmental defenders, on access to justice for victims of TNCs abuses and environmental crimes, and on defining obligations and sanctions for TNCs with respect to human rights violations. After at least two decades of debate around voluntary approaches for business in regards to human rights, while the UN system has increasingly opened the doors for corporate influence, a legally binding Treaty must be a tipping point in this matter and establish concrete mandatory rules for TNCs and enforceable instruments controlled by states in the public interest. The Treaty is needed now more than ever, when TNCs have in practice been provided with a shield of special rights and privileges through trade and investment agreements that consolidates their economic power, perpetuating impunity and threatening state and peoples' sovereignty.

In 2014 the Treaty proposal was supported by more than 600 organizations and 400 individuals, from 95 countries, by the Subcommittee on Human Rights of the European Parliament, by several Special Rapporteurs – including the SR on the Right to Health – and the Vatican. In June 2014 the UNHRC voted and approved the resolution presented by Ecuador and South Africa, establishing an open-ended intergovernmental working group to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of TNCs with respect to Human Rights (Res 26/9). Since then support has grown from civil society groups, social movements, affected communities, academia, parliamentarians and states[1].

This statement presents to the state members in the first session of the open-ended intergovernmental working group (OEIWG) the preliminary result of discussions within Friends of the Earth International about the proposals regarding the nature, scope and content of the Treaty, and reflects our opinion on six crucial issues for the federation that a legally binding instrument on control of TNCs regarding human right should address.

On scope and nature:

1. The Treaty should provide a framework to recognize and protect all Human Rights above TNCs privileges

The Treaty should define obligations that businesses need to respect regarding ALL human rights.
These should include Economic, Social and Cultural Rights (ESCR) as well as environmental, labor civil and political rights.
The Treaty should also reinforce states obligations to protect and respect human rights and provide judicial remedy to victims in case of violations by TNCs, including extra territorial obligations.
The treaty must define instruments to monitor, judge and apply sanctions on TNCs for human rights violations, including reparations to victims and affected communities and peoples.
The scope of these new juridical instruments under the Treaty must be mandatory and reinforce the hierarchical superiority of Human Rights framework over other treaties, including trade and investment agreements, as well as arbitration tribunals.

[1] See news at: www.treatymovement.com and the program for a Week of Mobilization from 6 to 11 of July in Geneva parallel to the OEIWG first session at: www.stopcorporateimpunity.org

2. The Treaty should aim to control and end impunity of TNCs regarding all Human Rights violations

The Treaty should establish the civil and criminal responsibility of TNCs and their executives.

While the proposed Treaty should prioritize TNCs, it should apply to all their subsidiaries and business relationships, as well as to all the companies in their global supply chains, including subcontractors and financiers, and eventually to all companies that commit or are complicit in human rights violations.
The Treaty should require States to provide legal liability (civil and criminal) in their national jurisdiction of both the TNCs and their executives (CEO, managers, administrative board) at the national level, based on the principle of double indictment.
The standards, obligations and enforcement mechanisms of the Treaty should eventually be applicable through appropriate means to all corporate human rights abuses, wherever they happen, and provide access to remedy for all victims.

On content and special provisions:

3. The Treaty should give special attention to Environmental Crimes committed by TNCs

Environmental crimes often result from TNCs operations, are committed on their behalf or as consequences of their actions[2]. TNCs must be held accountable for their direct or indirect environmental crimes, be they localized and circumstantial (or even 'accidental'), or historic and systemic.

The Treaty should include strong provisions on the obligations of TNCs to respect environmental protection laws and the implementation of the precautionary principle, including obligations to compensate victims and affected peoples, to restore ecosystems and to rehabilitate peoples livelihoods.

Destruction of the natural environment and peoples livelihoods violates the human rights to health, to water, to enjoyment of a safe, clean, healthy and sustainable environment. It can lead to the violation of other rights, such as the right to housing, to health and education, and the right to self-determination, when displacement results from environmental damage, in the form of forced eviction by mega projects, or by severe pollution, climate change or other disasters.

The Treaty should include a reference to Ecocide caused by the direct or systemic violations by TNCs. *Ecocide is* the extensive damage to, destruction of or loss of ecosystem(s) of a given territory to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished, or when systemic death and extermination of species occur[3].

The inclusion of Ecocide in international law aims to prohibit mass damage and destruction of the Earth and creates a legal duty of care for all inhabitants – including all living beings – that have been or are at risk of being significantly harmed due to Ecocide. The duty of care applies to prevent, prohibit and pre-empt both human-caused Ecocide and natural catastrophes.

In this sense the Treaty should look for the means to assess the current or historical responsibility of TNCs regarding ecocide, when their operations lead to the threat of death or extinction of communities and ecosystems. These can be localized cases of systematic violations – such as the destruction of people's lives and livelihoods by Shell in the Niger

[2] See for example the case of Wilmar in Nigeria at: http://news.mongabay.com/2015/0528-norman-nigeria-palm-oil.html and in Indonesia at: http://business-humanrights.org/en/indonesia-friends-of-the-earth-says-wilmars-logging-violates-rights-of-local-communities-calls-on-eu-to-drop-biofuels-target
See also the cases of Shell in Nigeria, Mekorot in Palestine or Hidralia in Guatemala at: http://ejatlas.org/featured/dismantle-corporate-power

[3] From: http://eradicatingecocide.com/the-law/ecocide-act/

Delta[4] –or present broader cumulative impacts resulted of historic operations of TNCs – such as climate change as a result of systemic human right violations by TNCs of the fossil fuel industry[5].

4. The Treaty must establish a World Court on TNCs and Human Rights

The Treaty should establish a UN court on TNCs and Human Rights to assure that TNCs are held accountable for their actions abroad, including through their affiliates, sub-contractors, licensees, financiers and the other business enterprises that they have relationships with..

The World Court should be responsible for judging international crimes and human rights violations committed by TNCs and for monitoring civil and penal responsibilities and applying sanctions to TNCs and their executives.

A World Court on TNCs and Human Rights must be complementary to universal, regional and national mechanisms and guarantee that affected individuals and communities have access to an independent international legal body in order to obtain justice for all business related human rights violations.

The Court should be responsible for receiving, investigating and judging complaints against TNCs. New types of international crimes, such as ecocide and other environmental crimes, should be recognized and fall under the competence of the World Court.

To complement this Court a treaty body (committee) should be established by the Treaty to monitor its implementation, receive public input and provide oversight. A Public Centre for the Control of Transnational Corporations should be established to register, analyse, investigate and inspect the practices of transnational corporations[6].

5. The Treaty must provide means to guarantee access to justice for victims of TNCs, to protect environmental and human right defenders and to recognize the rights of affected peoples

The Treaty should ensure mechanisms to guarantee the Centrality of Victims on reporting business related human right violations and provide them access to justice and remedy, including reparation and restoration of the environment and livelihoods.

The system must allow states and affected communities to present claims against TNCs and be structured at the local, national, regional and international levels.
It must require states to monitor and regulate the operations of business enterprises under their jurisdiction, including when acting outside their national territory, with a view to prevent the occurrence of abuses of human rights in the course of those operations.
It must require states to provide access to an effective remedy by any state concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there is no basis for the states involved to exercise their territorial or extraterritorial obligations[7].

The Treaty must protect the right to defend human rights (including environmental rights) and Environmental Defenders: people in local communities and environmental campaigners who are often victims of intimidation and human rights violations by corporations, suffering acts of violence against them and violations of their rights.

Conflicts over territory and natural resources lead to business related violations of human rights as well as rights violations against environmental defenders. Environmental defenders who uphold the right of communities to determine

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[4] See more about Shell court case on: https://milieudefensie.nl/english/shell/courtcase

[5] See demands of the MOVIAC – Movement of Victims and Affected Peoples by Climate Change and Transnational Corporations in Central America, at: http://radiomundoreal.fm/Real-Change-from-the-Bottom-Up?lang=en and at: http://radiomundoreal.fm/Declaracion-de-San-Salvador?lang=en

[6] See Peoples Treaty base document – Juridical Dimension at: *www.stopcorporateimpunity.org/?page_id=5534*

[7] For example, in the case of victims of Mekorot in Occupied Palestine. See more on BDS campaign at: http://www.bdsmovement.net/tag/mekorot

their own development path in opposition to corporate-driven mega projects are subject to many types of human rights abuses, often committed by corporations or on their behalf. [8] Corporate social responsibility strategies have failed to stop human rights violations and environmental destruction[9], and instead have been used to cover up corporate abuses of communities, the environment, and of environmental defenders.

FoEI demands that the Treaty recognizes the rights of environmental defenders in legitimate defense of territories and human rights and to improve mechanisms to keep them safe.

The more specific definition of the concept of Affected Peoples and the recognition of their rights is demanded by movements of workers, peasants, indigenous peoples, women, people affected by dams, plantations, mining and other extractive activities and climate change as a consequence of systemic operations of corporations. There is a need for their rights access to reparation to be codified in rights at the international level[10].

This lack of legal recognition or of an international framework to protect affected peoples rights allows that peoples affected by the same corporations or corporate practices be treated differently in different states, by different (or the same) corporations who commit human rights violations.

The narrow or limited definition of the concept of people affected by corporations and the different forms of redress awarded in each case can be explained by the lack of recognition of affected peoples' gains as rights: there is no national or international legal framework to guarantee these rights.

FoEI supports social movements affected by transnational corporations mobilizing to obtain redress for the violation of their economic, social, cultural and environmental rights, and to have the concept of the rights of affected people by corporations regulated at the national and international levels.

The creation of a legal framework in the Treaty that recognizes the rights of affected peoples – by dams, mining or other activities as well as by systemic environmental crimes committed by corporations, such as the case of climate change – would represent social movement gains be legally recognized as rights.

On process and participation:

6. The OEIWG should establish clear rules of participation to prevent corporate capture regarding the Treaty process

The existing rules for the participation of observers with ECOSOC status in the OEIWG should be applied as a minimum standard to limit corporations' influence on Treaty negotiations.

The Treaty should address the needs and realities of people and communities whose human rights have been infringed, or are being threatened, by corporate conduct. Special attention and priority should be given to the participation of representatives from communities and organizations of people affected by transnational corporations and other business enterprises.

As the Treaty should target TNCs, the OEIWG process should guarantee no undue influence by corporations on negotiations, establishing further criteria preventing corporate capture of the Treaty process. It is not for businesses to decide what sanctions should be imposed on them if they themselves are involved in human rights violations.

The corporate capture – often through sponsorship, lobbying, revolving doors, as part of official delegations or as stakeholders in negotiations – is all too common in the UN and other international spaces, and has resulted in ineffective voluntary approaches to dealing with corporate misconduct regarding human rights violations and weak global environmental policies[11].

The Treaty brings an historic opportunity for a UN turnaround on the issue of corporate capture, setting higher UN standards to limit business influence on international policy-making spaces.

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[8] See FoEI Report on Environmental Defenders *We defend the environment, we defend human rights* (2014) at: http://www.foei.org/resources/publications/publications-by-subject/human-rights-defenders-publications/we-defend-the-environment-we-defend-human-rights

[9] See for example the case Anglo America and El Cerrejón coal mine in Colombia *How corporations rule Part 4: Anglo American's dirty energy lobby and its false climate solutions* (2014) at: http://www.foei.org/wp-content/uploads/2014/11/17-foei-corporate-capture-report-eng-lr.pdf

[10] See Peoples Treaty base document – Alternatives Dimension at: www.stopcorporateimpunity.org/?page_id=5534

[11] Se FoEI Report *Reclaim UN from Corporate Capture* (2012) at: http://www.foei.org/wp-content/uploads/2013/12/Reclaim-the-UN.pdf